

FEDERAL ELECTION COMMISSION
MATTER UNDER REVIEW 5572
SPECIAL OPERATION FUNDS
PROBABLE CAUSE HEARING

Wednesday, September 24, 2008

999 E Street, N.W.

9th Floor Hearing Room

Washington, D.C.

10:03 a.m.

JARDIM REPORTING ASSOCIATES
(703) 867-0396

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COMMISSION MEMBERS:

DONALD F. MCGAHN, II, Chairman

STEVEN T. WALTHER, Vice Chairman

CYNTHIA L. BAUERLY, Commissioner

MATTHEW S. PETERSEN, Commissioner

ELLEN L. WEINTRAUB, Commissioner

CAROLINE HUNTER, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

JOHN GIBSON, Deputy Staff Director

WITNESSES:

HEIDI ABEGG

P R O C E E D I N G S

(10:03 a.m.)

CHAIRMAN MCGAHN: Good morning, today is September 24, 2008, and we are here for a Probable Cause Hearing entitled MUR 5572: Special Operations Funds, regarding Mr. Dave Rogers.

I like to make my thoughts known that generally giving people an opportunity to be heard is never a bad thing.

Respondent will have 20 minutes to give a statement and you may divide your time between opening and closing so you can get the first word and the last word.

It is interesting how the light is sort of focused right on you there.

And then you can let us know how you want to divide the time and the idea is that you give a statement and then the Commissioners can ask questions and under our procedures as set forth in the policy statement, counsel and staff director also get to ask questions.

And then responding to questions, there is

1 no time limit on that. We have carved out some
2 significant time here, and with that, take it away.

3 MS. ABEGG: Thank you for the opportunity to
4 address your questions today.

5 Four years after a complaint was filed in
6 this matter we are still here and we still have no
7 guidance from the Commission as to what the rules are
8 in this area. Again, I strongly urge the Commission
9 to institute formal rulemaking in this area rather
10 than attempt to fashion a rule through this matter.

11 I would like to note that nearly all of the
12 questions put forth by the general counsel were
13 questions raised in the notice of proposed rulemaking
14 which, as you know, no final rule was issued.

15 One of the points I wanted to make today is
16 about the unique nature of mailing lists as compared
17 to other campaign assets. The unique nature of
18 mailing lists makes it difficult in my opinion to
19 apply Section 439(a) as compared to other campaign
20 assets. The unique nature of mailing lists makes it
21 difficult in my opinion to apply Section 439(a).
22 Mailing lists, both postal and electronic, are

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1 developed and enhanced through the efforts of both a
2 principal campaign committee and the candidate. It
3 is extremely common, as our submissions in this
4 matter have noted, for a candidate to co-own a
5 mailing list. Not only is this common in the
6 non-political arena, but it is a common practice for
7 candidates and office holders to lend their names to
8 their own campaigns, their parties or other PACs, and
9 non-profit organizations in exchange for an ownership
10 interest in the responders.

11 Another point I wish to make is that there
12 should be no legal distinction between a candidate
13 co-owning a mailing list and a candidate office
14 holder -- there should be no legal distinction
15 between a candidate and his campaign co-owning a
16 mailing list and a candidate office holder entering
17 into a co-ownership agreement with a leadership PAC,
18 a political party or with a non-profit organization.

19 The general counsel has argued that the
20 candidate and his campaign committee are one and the
21 same and therefore a candidate cannot profit from the
22 sale of his own committee's mailing list simply

1 because it has used his name or likeness.

2 While it is true that the candidate and his
3 campaign committee share a common goal, the election
4 of that candidate, the candidate has assets and
5 interests not shared by his committee. The
6 candidate's good name and life story are important
7 assets which can be used in whatever pursuit the
8 candidate chooses. While the candidate lends these
9 assets to the campaign in support of their common
10 goal, the candidate's name and life story do
11 not become the sole possession of the campaign
12 committee to be returned on election day.

13 Looking at the issue from another angle,
14 many direct mail experts will tell you that mailings
15 can have diminishing returns. There comes a point
16 when additional mailings are not effective. The
17 mailing list has lost its value. A campaign using a
18 candidate's name and life story can also cause a
19 candidate's name and life story, important individual
20 assets, to lose value. After a campaign, the public
21 maybe so sick and tired of hearing a candidate's
22 story, that the candidate's name and story may have

1 little monetary value. If the candidate has not
2 received any value in return for the campaign using
3 his name and story, and the campaign exhausts the
4 value of those assets, in the form of name and story,
5 the candidate is left with nothing, especially if he
6 has lost the election.

7 Or as another example, suppose an actor with
8 an interesting history and life story decides to run
9 for federal office. He obviously will lend his name
10 and likeness to his campaign but he may not allow the
11 campaign to use his name in a certain way or to use
12 stories about them that he has been saving for his
13 future best-selling tell-all book.

14 And so seen in this light, it is easy to see
15 why a candidate's name and life story cannot be
16 treated the same way that other assets are when using
17 that story and while the committee terminates after
18 the election, the candidate continues on, either in
19 office or in other pursuits, but whatever path a
20 candidate takes, his name and life story continue to
21 be a very important asset to him.

22 In this manner, Mr. Rogers provided his

1 campaign with an initial list. He also helped to
2 enhance the committee's efforts by lending his
3 compelling life story to the campaign thus taking a
4 chance that its compelling nature would be lessened
5 through repeated telling, a sort of depreciation, if
6 you will. Yet, the general counsel has argued that
7 Mr. Rogers did not provide the committees with any
8 significant consideration, much less fair market
9 value.

10 So I urge the Commission to institute
11 rulemaking to provide guidance as to exactly what is
12 significant consideration or fair market value.

13 I also urge the Commission to apply only the
14 usual and normal charge standard. Applying the bona
15 fide arm's length standard would catch within it any
16 transaction that was usual and normal but which
17 involved parties that had some sort of relationship,
18 such as a candidate and his campaign committee, a
19 candidate and her leadership PAC or a candidate and a
20 foundation on whose board the candidate sits.

21 Our submissions have provided many examples
22 and I won't repeat them here to support our assertion

1 that the transactions at issue in this matter are
2 usual and normal in the direct mail industry. The
3 general counsel has also completely ignored the
4 efforts of Mr. Rogers. The general counsel brushes
5 aside Mr. Rogers' life story because he has not yet
6 attempted to sell it and no one has offered him money
7 for the rights to it.

8 The general counsel also discounts all
9 non-monetary efforts by Mr. Rogers stating he did not
10 expend any funds in developing the initial list. But
11 the fact that funds may not have been expended in
12 compiling an initial list cannot mean that the
13 initial list has no value, otherwise how could any
14 initial list have value? How would an individual
15 expend funds to provide satisfactory consideration to
16 the Commission?

17 Under the general counsel's theory, a
18 businessman that comes with a Rolodex full of wealthy
19 individuals to compile a list for his campaign, has
20 not expended any funds, yet no one could argue that
21 his list of wealthy potential donors has no value.

22 Any determination of fair market

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1 value should involve an analysis of the value the
2 candidate provides to the development and enhancement
3 of the list. Both the candidate and the committee
4 contribute something toward the development of the
5 list. The candidate contributes his name, life
6 story, sometimes an initial list and sweat equity on
7 the campaign trail. The committee's contribution
8 involves the mechanics, getting direct mail pieces
9 out the door, making sure names are added to the
10 lists, searching for other lists to mail to and
11 enhancing the current list.

12 Valuing the list based on cost, as the
13 general counsel has done, is not a sound method.
14 First, the cost of developing some list, such as a
15 political party list that has millions of names and
16 has been in existence for many years maybe very
17 large.

18 Second, fair market value has always been
19 determined by looking at what someone in the market
20 would be willing to pay. The focus has never been on
21 what has already been paid. And to the extent that
22 the Commission does look at cost, it must also factor

1 in the income the committees have received to offset
2 this cost and no analysis of income has been done
3 here.

4 The Commission has previously approved
5 transactions between candidates and political parties
6 where the candidate did not contribute any names. In
7 these cases, in exchange for lending his or her
8 signature, a candidate received names generated from
9 a mailing that was comprised exclusively of names
10 developed solely by the political party, either by
11 purchasing or renting other mailing lists and by the
12 work of campaign volunteers.

13 Therefore, the general counsel's reliance on
14 Mr. Rogers' failure to expend fund and his campaign
15 committee's expenditure of funds is misplaced.

16 And finally on page nine of its brief, the
17 general counsel argues that the Rogers' committees
18 did not appear to receive anything in exchange for
19 the transfer, and as I have noted, this is simply not
20 true. The committees received the use of his name
21 and life story and an initial list and furthermore
22 there was a potential depreciation of the valuable

1 assets of his name and life story.

2 I am happy to answer any questions you might
3 have.

4 CHAIRMAN MCGAHN: Before we want to go to
5 the questions, I want to note that Commission Hunter
6 had a family/relative issue she had to attend to and
7 apologizes for not being here, but this is
8 transcribed and she assured me she is going to review
9 the transcript. She is not here because she is
10 unfortunately tied up, not because she has already
11 made up her mind.

12 Mr. Vice Chairman?

13 VICE CHAIRMAN WALTHER: I had a question on
14 the ownership agreement. What did co-ownership mean
15 in this particular contract, memorandum of
16 understanding? Joint ownership or why wasn't it
17 divided according to some percentages of some kind?

18 MS. ABEGG: It is my understanding that the
19 memorandum of understanding was intended to provide
20 for co-ownership.

21 VICE CHAIRMAN WALTHER: Meaning?

22 MS. ABEGG: That each party could do what

1 they wished with the list.

2 VICE CHAIRMAN WALTHER: Therefore, the
3 campaign could have rights to sell it?

4 MS. ABEGG: Correct.

5 VICE CHAIRMAN WALTHER: And the candidate
6 could have the right to sell it?

7 MS. ABEGG: Correct.

8 VICE CHAIRMAN WALTHER: If one sold that,
9 then wouldn't one suffer -- the other side suffer
10 because it wouldn't be an exclusive list any more?

11 MS. ABEGG: It is possible.

12 VICE CHAIRMAN WALTHER: Because I see over
13 here, there is a contract to sell the property, and
14 the candidate transferred it to BMW to be the sole
15 owner of the list.

16 MS. ABEGG: The sole owner of Rogers --

17 VICE CHAIRMAN WALTHER: And the campaign
18 retained an ownership interest in it or did Rogers
19 sell both the candidate's -- or did Rogers
20 sell -- here Rogers is selling his individual
21 interest?

22 MS. ABEGG: Right. It is my understanding

1 that the campaign still retained its ownership.

2 VICE CHAIRMAN WALTHER: So the campaign
3 could still sell the list?

4 MS. ABEGG: Correct.

5 CHAIRMAN MCGAHN: Commissioner Weintraub?

6 COMMISSIONER WEINTRAUB: Thank you, Mr.
7 Chairman.

8 To follow-up on that, if you are selling
9 sole ownership, has does somebody else retain
10 interest in it? If sole ownership has already been
11 sold?

12 MS. ABEGG: Mr. Rogers sold his sole
13 ownership.

14 COMMISSIONER WEINTRAUB: But he didn't have
15 sole ownership. He had co-ownership. Was it a
16 fraudulent contract?

17 MS. ABEGG: No, maybe they used poor
18 wording, but he sold his sole --

19 COMMISSIONER WEINTRAUB: He doesn't have
20 sole ownership according to the words of the contract
21 and what you just said.

22 VICE CHAIRMAN WALTHER: The issue being here

1 the contract says the transferee will be the sole
2 owner of this list.

3 MS. ABEGG: Right. I understand that is
4 what the contract said. But it is my understanding
5 that the campaign nevertheless retained its --

6 VICE CHAIRMAN WALTHER: And BMW recognized
7 it was a non-exclusive list and paid that money to
8 the candidate?

9 MS. ABEGG: That I don't know.

10 CHAIRMAN MCGAHN: Actually, I would rather
11 free form this because this recognition stuff just
12 isn't going to work. More like a judicial thing.
13 Fire away.

14 COMMISSIONER WEINTRAUB: Did the campaign
15 ever get any money out of the sale of the lists?

16 MS. ABEGG: Not to my knowledge.

17 COMMISSIONER WEINTRAUB: You don't question
18 that it was an arm's length transaction between the
19 campaign and the candidate?

20 MS. ABEGG: I believe we did indeed contest
21 that.

22 COMMISSIONER WEINTRAUB: It was an arm's

1 length transaction? I thought you are saying it
2 doesn't matter whether it is an arm's length
3 transaction?

4 MS. ABEGG: I am, but I think we were still
5 arguing it was an arm's length transaction.
6 Mr. Rogers testified to that, either in an affidavit
7 or his deposition, that the treasurer was involved
8 for the committee and Mr. Rogers signed on behalf of
9 himself.

10 COMMISSIONER WEINTRAUB: Couldn't Mr. Rogers
11 fire the treasurer?

12 MS. ABEGG: Of course.

13 COMMISSIONER WEINTRAUB: So how is it an
14 arm's length if you are negotiating with someone whom
15 you can fire if he doesn't do what you want him to
16 do?

17 MS. ABEGG: Well, I guess he always has that
18 power so -- I mean -- I mean, someone has to
19 represent the committee as well --

20 COMMISSIONER WEINTRAUB: That is why it is
21 not an arm's length transaction.

22 The Friends of Dave Rogers, that was the

1 authorized committee of Dave Rogers?

2 MS. ABEGG: Correct.

3 COMMISSIONER WEINTRAUB: What was it
4 authorized to do?

5 MS. ABEGG: Elect Dave Rogers to Congress.

6 COMMISSIONER WEINTRAUB: Was it not
7 authorized to talk about Dave Rogers in the course of
8 trying to elect him to Congress?

9 MS. ABEGG: Correct.

10 COMMISSIONER WEINTRAUB: And Mr. Rogers
11 would have benefited from being elected, right?

12 MS. ABEGG: Correct.

13 COMMISSIONER WEINTRAUB: So is there any way
14 a campaign committee can function if it doesn't use
15 the facts of the candidate's life?

16 MS. ABEGG: No, but there may be some facts
17 that the candidate has said are off limits and may
18 not be used.

19 COMMISSIONER WEINTRAUB: Is that what is
20 going on here, that he had some off-limit facts
21 that --

22 MS. ABEGG: No, not necessarily off-limit

1 facts, but there may be some stories that he didn't
2 want told during the course of the campaign, that he
3 was saving for some other reason.

4 COMMISSIONER WEINTRAUB: Did that happen?

5 MS. ABEGG: I don't know. I mean, he
6 had -- Mr. Rogers has been a Navy seal. He has all
7 kinds of experiences that occurred while he was in
8 the military, and he didn't share all of those with
9 the campaign.

10 COMMISSIONER WEINTRAUB: Then those stories
11 weren't exhausted in your terms or devalued by the
12 campaign?

13 MS. ABEGG: No, the ones he did not share,
14 but the campaign didn't acquire the rights to every
15 fact or story about Mr. Rogers just because he was
16 running for office.

17 COMMISSIONER WEINTRAUB: But he could
18 control what his campaign used as his life story.

19 MS. ABEGG: Correct.

20 COMMISSIONER WEINTRAUB: I guess I am just
21 having a lot of trouble, and may be you have read my
22 previous statements on this general subject matter so

1 it won't take you by surprise, I hope, but I have a
2 lot of trouble with the concept that there is some
3 kind of consideration that the campaign owes the
4 candidate something for the use of his life story.
5 Does the McCain campaign owe John McCain something
6 for using the story of his heroism in Vietnam?

7 MS. ABEGG: I would argue that that is
8 sufficient consideration if he wanted co-ownership of
9 the names.

10 COMMISSIONER WEINTRAUB: Well, if the value
11 of a candidate's life story -- it seems to me, either
12 it has value to the campaign and he can get something
13 out of it as a result or it doesn't. If it does have
14 a value, then he ought to be disclosing that. Did
15 the campaign ever disclose that there was an in-kind
16 contribution to the campaign of the value of his life
17 story?

18 MS. ABEGG: Of course not. How does one
19 value -- what he is providing to the campaign -- I
20 mean --

21 COMMISSIONER WEINTRAUB: How does one value
22 that, Ms. Abegg? That is what we are talking about.

1 MS. ABEGG: My argument is that the campaign
2 lending his name and his stories and likeness is
3 consideration enough to receive co-ownership of those
4 names.

5 COMMISSIONER WEINTRAUB: Is there any way he
6 can run for office if he does not lend, as you say,
7 his biography to his campaign --

8 MS. ABEGG: No, no, it is not possible.

9 COMMISSIONER WEINTRAUB: So isn't that part
10 of authorizing a campaign committee to act on your
11 behalf, that you are authorizing them to use your
12 life story without --

13 MS. ABEGG: Well, he is authorizing the
14 campaign to, I guess you could say, rent his name and
15 likeness through the course of the campaign. When
16 the campaign is over, it is still the candidate's
17 name and likeness. At the end it may have been
18 depreciated. It may have lost some of its value and
19 why should he not receive consideration in the form
20 of names that arise out of the use of his name and
21 story?

22 COMMISSIONER WEINTRAUB: Senator McCain's

1 life story been devalued by his campaign?

2 MS. ABEGG: I don't know. Maybe after the
3 election people will be so tired of hearing it, may
4 be he wouldn't receive as much for a tell-all book
5 after the campaign.

6 COMMISSIONER WEINTRAUB: I think he has
7 already written those books, but we are not going to
8 agree on this, but I do want to make one other point
9 and that is, I was really struck when I was reading
10 your brief by how you phrase things here and how you
11 cited things, and you do understand -- you have been
12 before the Commission before, you do understand that
13 it takes four votes to persuade the Commission.

14 MS. ABEGG: Correct.

15 COMMISSIONER WEINTRAUB: So when you say the
16 Commission ultimately concluded that the mailing list
17 exchanges that were the gravamen of the initial
18 complaint in MUR 5181 did not violate the law and
19 your authority for that is that it was the belief of
20 two Commissioners, that is just a flatly inaccurate
21 statement because I was here during that MUR. I
22 remember it vividly and believe me, the Commission

1 never made any conclusion as to whether that violated
2 the law or didn't violate the law. It was unable to
3 make that conclusion.

4 CHAIRMAN MCGAHN: Wait, wait, wait, if I can
5 jump in. Actually I disagree that is a misstatement
6 because if you come at it from the perspective of
7 once the Commission goes down the road of a
8 case-by-case enforcement in lieu of a reg, which we
9 can do, fails to enforce, that is a Commission
10 decision and some schools of thought will say that
11 was actually a ruling by the Commission, even though
12 you couldn't get four votes in that particular case,
13 that does essentially become the operative rule going
14 forward. So I am not entirely convinced that counsel
15 is stating -- is misstating or presenting things that
16 are not true because I think there is an issue in
17 this case as to what really is the law and to me I
18 came at this from the perspective of we had a
19 rulemaking which died, as I understand it. There has
20 been some MURs. No MURs, I think, have talked about
21 this situation, where a candidate does essentially a
22 signature agreement. Now, life story and all that, I

1 am not sure I am buying all of that, but essentially
2 a name-use agreement with the campaign where there is
3 joint ownership, co-ownership, as the original
4 agreement says between the candidate and his own
5 campaign.

6 So I think the fact that the Commission
7 couldn't muster four votes in cases is essentially a
8 Commission ruling. But then that begs the question
9 of those MURs didn't concern this situation, as I
10 understand it.

11 COMMISSIONER WEINTRAUB: So I think the
12 issue is pretty close to this, but the point -- my
13 point, Mr. Chairman, is that the Commission on
14 various occasions, and I have encouraged us to do
15 this whenever we can, made affirmative findings that
16 somebody didn't violate the law. We find no RTB on a
17 regular basis. We may conclude an investigation and
18 say there was a violation here but there was no
19 violation there.

20 That conclusion that the law was not
21 violated was not made in that case. There was a
22 failure to agree, there was a failure to enforce, you

1 are correct on that but there was never a Commission
2 conclusion that it did not violate the law.

3 CHAIRMAN MCGAHN: I understand the
4 distinction, but let me ask counsel, to the outside
5 world, when that occurs, how does those in the
6 so-called regulated community view such action and it
7 is kind of a multi-part question. Is a deadlock seen
8 differently from Commission actually affirmatively
9 saying we are not going to enforce in an area, is it
10 taken the same way, how is it viewed to someone in
11 this position after the Commission has MURs and
12 either deadlocks or votes to take no further action
13 and how is this viewed to the outside world?

14 MS. ABEGG: I would say for a layman or for
15 our clients, unless the Commission has affirmatively
16 taken action, that they treat that as no violation,
17 nothing was found -- no law was found to be violated
18 if there is no agreement, affirmative agreement.

19 CHAIRMAN MCGAHN: Right. So do you then
20 take that and say that is the rule and you act upon
21 that and that becomes essentially the rule that you
22 operate under, the Commission didn't enforce in this

1 particular area, therefore that means it is okay?

2 MS. ABEGG: Okay or extremely unclear. If
3 there is other affirmative action taken by the
4 Commission that doesn't seem to gibe.

5 CHAIRMAN MCGAHN: I can keep going on the
6 questions. I think -- to the outside world, what is
7 the law in this area? What do you think the rule is?

8 MS. ABEGG: I think the rule currently, if
9 candidates are lending their name in exchange for
10 co-ownership of lists --

11 CHAIRMAN MCGAHN: Why do you think that is
12 the rule based upon what the Commission has done
13 before?

14 MS. ABEGG: Because I have read press
15 reports of the candidates doing this with their
16 leadership PACs, with political parties. I have
17 personal knowledge.

18 CHAIRMAN MCGAHN: That is not my question.
19 The question is what has this Commission done that
20 supports the conclusion that what your client did was
21 okay?

22 MS. ABEGG: Failure to institute rulemaking

1 and the positions taken in the MURs cited in the
2 brief.

3 CHAIRMAN MCGAHN: Can you expand on that?
4 It is not just a failure to institute rulemaking.
5 There are a lot of areas where -- there was actually
6 a proposed rule -- I am looking for the history on
7 that because frankly I haven't focused on lists in a
8 while and I am looking for some help to save me some
9 time from having to go through a bunch of briefs.

10 MS. ABEGG: Sure. This cuts through on the
11 rulemaking -- there was a provision in rulemaking
12 that would have specifically prohibited a candidate
13 from co-owning the list and then there were other
14 issues brought up in the notice of proposed
15 rulemaking, questions that have come into play here.

16 But as far as the other MURs, in the
17 Ashcroft MUR, John Ashcroft co-owned a list with his
18 leadership PAC which was thereafter transferred to
19 his campaign committee which wasn't exactly the same
20 situation as here because I believe it involved a
21 transfer from his PAC to his campaign committee
22 rather than through Mr. Ashcroft himself. There was

1 also --

2 COMMISSIONER WEINTRAUB: I don't want to
3 interrupt. You got that wrong. In fact, that would
4 have been a huge -- that I think everybody would have
5 agreed could not have happened. It was an up and
6 down transaction, the leadership PAC transferred the
7 list to the candidate and the candidate gave it to
8 the campaign. Obviously the leadership PAC couldn't
9 have just handed over an asset to the campaign.

10 CHAIRMAN MCGAHN: Because of contribution
11 limits?

12 COMMISSIONER WEINTRAUB: Yes.

13 CHAIRMAN MCGAHN: But if they did a list
14 exchange, they could.

15 COMMISSIONER WEINTRAUB: That is not what
16 happened.

17 CHAIRMAN MCGAHN: I understand that. But a
18 PAC and a campaign do a list exchange and hand lists
19 each other, correct?

20 MS. ABEGG: I assume so. If the lists are
21 of equal value.

22 CHAIRMAN MCGAHN: If you could continue

1 answering my question?

2 MS. ABEGG: There was also the MUR involving
3 Senator Dole, Robert Dole, and a third party. They
4 entered into an agreement to provide Senator Dole
5 with the names of the individuals who responded to
6 the letters he signed on behalf of that organization,
7 and there was testimony in that MUR that indicated
8 that this was usual and normal in the direct mail
9 industry.

10 CHAIRMAN MCGAHN: Here is where I am hung
11 up, just to cut to the chase. I think that public
12 officials, candidates, people with some sort of name
13 ID or reputational cache enter into name usage
14 agreements all the time. I will sign a letter for
15 your organization, you give me the names. I don't
16 have any problem with all of that. I think that is
17 common. I think there is value there. I think
18 somebody's name does carry value and it is not the
19 sort of thing that the FEC needs to second guess. I
20 think it is the lay of the land in the marketplace.

21 Where I get hung up here though is, this is
22 not someone on the street signing -- this is not the

1 Speaker of the House signing a letter for the
2 Democratic Party. This is not a vanquished
3 presidential candidate who still doesn't realize he
4 should get out of the race, hasn't happened too often
5 lately, but there are some that are asked to sign a
6 letter for some 501(c)(4) that happens to agree with
7 them.

8 This is a candidate in his own campaign and
9 the question I really have is assuming what I just
10 said is true, that I think it is fine for somebody to
11 sign things for everybody else, why is it okay for a
12 campaign, because Commissioner Weintraub's questions
13 are not lost on me. It seems like what really is the
14 exchange here? I understand we tried to do a rule, a
15 rule didn't happen. We have MURs, and they dead
16 locked, however you want to spin the MURs. I still
17 go back to, is the rule that there has to be a fair
18 market value, some exchange or not, and if that is
19 the rule -- if the guy put in a lot of names, he put
20 a lot of work into the first list, I can maybe buy
21 that but I am having a little trouble here to get
22 where you are and I am asking you to help me get

1 there.

2 MS. ABEGG: If the name has value in these
3 other contexts, does the name lose value when it
4 becomes the individual's campaign committee?

5 CHAIRMAN MCGAHN: No, but part of what
6 happens when you run for office, your name is the one
7 on the sign. You are running, so it is your
8 authorized committee, and it seems to me, that, yes,
9 sure, your name has a lot of value, but who are you
10 doing the exchange with at that point, your
11 treasurer? And then it raises the question -- let's
12 say the campaign comes and goes, the guy loses, the
13 campaign owns the list as well, correct?

14 MS. ABEGG: Correct.

15 CHAIRMAN MCGAHN: Who then can sell that
16 list and what happens to that list?

17 MS. ABEGG: Where the campaign owns the
18 list, the campaign can sell it.

19 CHAIRMAN MCGAHN: Is that the treasurer, the
20 candidate, the campaign manager, who makes that
21 decision?

22 MS. ABEGG: Probably the treasurer.

1 CHAIRMAN MCGAHN: Could the candidate want
2 to sell the campaign list on behalf of the campaign
3 and the treasurer says, no and then it doesn't get
4 sold?

5 MS. ABEGG: I guess it depends on the
6 campaign committee. The treasurer can be replaced,
7 as Commissioner Weintraub said.

8 CHAIRMAN MCGAHN: Okay. Let's talk about
9 this campaign committee. I am trying to find a
10 distinction between a candidate and a campaign here
11 for purposes of a list and I am having trouble seeing
12 it and that is where I am.

13 MS. ABEGG: I mean, in Mr. Rogers case, the
14 campaign could have sold the list and then you would
15 have competing lists out on the market which is the
16 same situation you would have in some of these MURs.
17 If Mr. Ashcroft sold his list and his leadership PAC
18 sold its list or rented out its list, you have
19 competing lists out in the marketplace, then people
20 are going to go to whoever -- which ever list owner
21 is offering the best terms.

22 VICE CHAIRMAN WALTHER: Counsel, in this

1 particular case, what difference does that memorandum
2 make, in connection with the rights involved? What I
3 read is -- your understanding is the ownership
4 agreement meant nothing because the person always
5 retained ownership of everything. Money was spent by
6 the campaign in good faith, \$212,000 and the
7 candidate considered that money to be the candidate's
8 for purposes of benefiting from it. So do you really
9 think that is contemplated in all the MURs we have
10 talked about here or AOs, that a candidate can retain
11 ultimately 100 percent, use all the campaign money,
12 have the benefit of that, after the campaign is over,
13 here, sold it before the campaign was over. In this
14 case if I am not mistaken, it was sold before the
15 campaign was over, in theory leaving the campaign no
16 rights to it whatsoever, if you believe this
17 language -- apparently you don't believe it, that the
18 sole ownership was vested in the purchaser at that
19 time?

20 MS. ABEGG: Correct, and that is one reason
21 I don't believe it is -- because the campaign had to
22 retain its ownership if the campaign was still going

1 on. Mr. Rogers cannot sell --

2 VICE CHAIRMAN WALTHER: Then you are
3 involved in misrepresentation then to BMW, sounds
4 like.

5 MS. ABEGG: Or just inartful drafting.

6 CHAIRMAN MCGAHN: The original memorandum of
7 understanding between Rogers and the campaign says it
8 is co-owned.

9 MS. ABEGG: Correct.

10 CHAIRMAN MCGAHN: But the agreement with the
11 list folks says something that they are given -- that
12 Rogers is the sole owner of the list?

13 MS. ABEGG: Correct. It would be my
14 argument that the memorandum of understanding trumps
15 that agreement with the list owner because Mr. Rogers
16 can't sell the campaign committee's list because he
17 didn't have rights to it.

18 CHAIRMAN MCGAHN: But then the candidate is
19 going out and selling something he doesn't have
20 rights to and the real question is, is that any
21 business of the Federal Election Commission, and if
22 it is, why, and if it is not, why?

1 MS. ABEGG: It is a private contractual
2 matter and I think it was inartful drafting, drafted
3 by someone who is not an attorney.

4 CHAIRMAN MCGAHN: I agree it is none of our
5 business, but the fact that it happened, is that
6 probative for something that is before us?

7 MS. ABEGG: No, I don't believe so.

8 CHAIRMAN MCGAHN: Why?

9 MS. ABEGG: Because it was a private
10 contractual matter.

11 CHAIRMAN MCGAHN: But the facts could still
12 be relevant to what we are doing here because if you
13 have a co-ownership agreement but then subsequently
14 candidate goes out and says sole ownership, to me
15 that kind of backs up the general counsel a little
16 bit because it looks like the candidate thinks it is
17 his list and he is essentially profiting off of it
18 personally and going beyond that to which he is even
19 entitled. That would actually help support a
20 personal use charge.

21 MS. ABEGG: I guess then testimony from the
22 list owners as to what they believed they were

1 receiving and/or from the treasurer as to his belief
2 as to what the campaign retained.

3 Another point I wanted to bring up is there
4 is no guidance as to how to value a list. In the
5 context of a candidate lending his name to a
6 leadership PAC, to a party, they lend their name and
7 they receive the responders in return. There is no
8 --

9 CHAIRMAN MCGAHN: Hold on. Generally in
10 those agreements, as I understand them, having
11 written lots of them, you get not -- you get people
12 who affirmatively gave money, so you get the
13 contributors --

14 MS. ABEGG: Correct, the contributors to
15 that mailing.

16 CHAIRMAN MCGAHN: You don't get every name
17 they mail, right?

18 MS. ABEGG: Right. But the candidate is not
19 spending any money, it is the party or the PAC who is
20 sending out that mailing who is expending the funds
21 for that mailing. All the candidate is doing is
22 providing his or her name. Yet, they are receiving

1 all of those names in return and in the case of the
2 candidate providing his name and even an initial list
3 to his campaign committee, how is that initial list
4 to be valued?

5 CHAIRMAN MCGAHN: Kind of what you are
6 saying, I think, or maybe you are not saying this,
7 maybe it is what you should be saying, is if it is
8 okay for a candidate to give their name in exchange
9 for names to a leadership PAC or a party committee,
10 why isn't it okay to give it to the campaign, that
11 certainly is a reasonable conclusion based on the
12 fact that we had a rulemaking and didn't go forward
13 and MURs so who are we to come in after the fact and
14 second guess what you could have done or not done.
15 Is that really the gist of the argument?

16 MS. ABEGG: Yes, and if that is not the
17 case, that you have a candidate that provides an
18 initial list to his campaign, how is that list to be
19 valued, there is no --

20 CHAIRMAN MCGAHN: You are really
21 side-stepping the fair market value issue entirely,
22 saying -- other people do it, we don't fly spec those

1 why should we fly spec this?

2 MS. ABEGG: Exactly. Maybe we don't analyze
3 it in the case of a candidate lending his name to a
4 PAC or to a party because it is too difficult to
5 value. So why not apply the same analysis to a
6 candidate who is lending his name to his own campaign
7 committee? That is difficult to value as well.

8 There is obviously value. Why second guess that?

9 CHAIRMAN MCGAHN: Where I get hung up is
10 there is already in the law a distinction between
11 principal campaign committee of somebody which is
12 inherently tied to that person's hip, they are going
13 to use that person's name, versus a leadership PAC or
14 party committee or non-profit or whoever who is not
15 automatically entitled to use the name. So there is
16 some value in everything but a campaign situation and
17 I think people may disagree on that premise, but for
18 my purposes I think there is value to their names,
19 and people give their names and sign letters and that
20 is cool, but where is the value to the campaign
21 to use the candidate's name when the campaign is
22 going to contain the candidate's name anyway and as I

1 hear it, the argument is not really we shouldn't
2 really concern ourselves with the value, it is
3 because we haven't done rulemaking and we have had
4 these other MURs which have gone other directions.
5 This person acted and now we shouldn't after the fact
6 say what he did is a problem.

7 MS. ABEGG: I would agree with that, but I
8 would also add that our argument is if it is a
9 valuable asset in these other contexts, it is also a
10 valuable asset in the campaign committee context and
11 why should the candidate not receive the names in
12 return simply because the candidate and the campaign
13 committee share the same goal?

14 CHAIRMAN MCGAHN: I guess what you are
15 saying is the candidate -- the candidate gets the
16 names and whether or not the names are valuable is a
17 different question. You could have candidates that
18 actually do exactly what this candidate did and they
19 can go over to BMW Lists and say I want to sell you
20 my name and BMW Lists could say your name is not
21 worth anything because you are not
22 worth anything, nobody wants to buy your donor list

1 but they may want to buy somebody else's contributor
2 list because that person's name -- then I come back
3 to are those names valuable without that person
4 signing a letter? This is where I get into this
5 circular thing in my head, the campaign versus the
6 candidate and is there really a distinction, a
7 distinction that I clearly see in these other
8 contexts, but I don't necessarily see it here, but I
9 am warming up to it, but I am not --

10 MS. ABEGG: I guess maybe I will try to
11 rephrase it differently. If it is an asset for
12 purposes of lending it to a leadership PAC or a
13 party, it is also an asset when a candidate lends it
14 to the campaign committee. So it is still valuable
15 consideration.

16 CHAIRMAN MCGAHN: If that is true, wouldn't
17 it have to be reported though?

18 MS. ABEGG: Well, it is not reported in
19 these other contexts.

20 CHAIRMAN MCGAHN: Right, because there is an
21 exchange -- there is an agreement. It goes back to
22 my list exchange which there was a method to my

1 madness. If you do a list exchange, that makes it
2 consistent with contribution limits so I have to
3 rephrase things now because you are doing essentially
4 equal names for equal names so it doesn't get
5 reported. But if there is something of value going
6 in, and I guess the names coming out, that is kind of
7 the agreement.

8 Now, the life story and all of that, is that
9 really separate value? Is that something -- I know
10 you kind of think it is, but in this case, I don't
11 know his story, what is his story that makes his
12 story more valuable than any other candidate's story?

13 MS. ABEGG: I wouldn't say necessarily more
14 valuable. He was a Navy seal. He served in the
15 first Gulf War. He was involved in Panama. He has
16 done a lot of covert actions, a lot of things that
17 people would find fascinating.

18 CHAIRMAN MCGAHN: So the distinction --
19 simply because one becomes a candidate, that doesn't
20 mean -- there is a difference between a guy's
21 personal and what he chooses to use as a candidate?
22 Essentially he wears two hats.

1 MS. ABEGG: Correct.

2 CHAIRMAN MCGAHN: What he uses as a
3 candidate and what he saves for the book.

4 Mr. Vice Chair?

5 VICE CHAIRMAN WALTHER: I have a question
6 for the general counsel. In the report that you
7 have, on page 90, it indicates, "In addition, Rogers'
8 life story does not appear to have any tangible
9 monetary value above the value of any individual's
10 life story if that individual decided to run for
11 Congress." Does that mean in your opinion that if it
12 had tangible monetary value your analysis would be
13 different, and if so, suppose somebody ran for
14 Congress and had a book out there or a
15 well-recognized life story at that point, talk about
16 McCain or somebody else, would that make a
17 difference?

18 COMMISSIONER WEINTRAUB: Mr. Vice Chairman,
19 I don't know how to say this, but I believe the
20 purpose of the hearing is for us to have a
21 conversation with Ms. Abegg, not question our counsel
22 in front of Ms. Abegg

1 VICE CHAIRMAN WALTHER: I think we are
2 entitled to have someone clarify that. I don't see a
3 problem with that unless the Commission decides not
4 to do it.

5 CHAIRMAN MCGAHN: What is odd about the
6 hearing is it is a probable cause recommendation,
7 which is counsel's recommendation and the respondents
8 replying to that. I think it cuts both ways. Under
9 the statute, the counsel's brief is really the
10 counsel's argument so perhaps -- I am not so sure
11 that the way that the policy statement is written is
12 essentially a back and forth. Perhaps it should be,
13 but I am not so sure it is. But given that the
14 counsel is allowed to ask questions of the
15 respondent -- under the policy statement we are
16 really not supposed to ask questions of the counsel.

17 VICE CHAIRMAN WALTHER: I will follow your
18 lead essentially because you are the chairman, but
19 that is an issue for me.

20 MS. ABEGG: I think I raised that in my
21 reply. What happens if an actor runs for federal
22 office. At what point does your name and your life

1 story then have enough value that you have provided
2 enough consideration that is satisfaction?

3 COMMISSIONER PETERSON: On this issue of
4 monetary value, what sort of factors do you think the
5 Commission should consider in determining what the
6 monetary value of what someone's story is? When I
7 looked at that issue as it was raised in both briefs,
8 I was left wondering, what sort of guidance -- how
9 would we as a Commission determine, okay, this is
10 sufficient -- this story is compelling enough because
11 maybe I like sports, this guy is an athlete, that is
12 compelling to me. How does we take it out of the
13 realm of purely subjective and have some firm
14 guidelines that we could follow in determining the
15 monetary value of someone's life story or is that a
16 determination that the Commission shouldn't be making
17 altogether?

18 MS. ABEGG: I don't think it is a
19 determination the Commission should be making. I
20 think there should just be a blanket rule that a
21 candidate providing his name and all the other things
22 that go along with a name, your story, your history,

1 is sufficient to receive a co-ownership in the
2 mailing list that you are going to be out there on
3 the campaign trail using your sweat and hard work to
4 get those responses. I think all of that is enough,
5 no matter if you are just someone -- a no-name
6 running for office or if you are a famous actor.

7 COMMISSIONER WEINTRAUB: The candidate is
8 not doing that to benefit the campaign committee as
9 an entity. The candidate is doing all that to get
10 elected to office which is benefit to himself.

11 MS. ABEGG: Correct. But he is also
12 using -- he is lending his campaign these assets, his
13 name.

14 COMMISSIONER BAUERLY: But the
15 distinction -- following on the Chairman's questions,
16 there is a distinction between lending your name to
17 an unaffiliated entity like a party committee or
18 perhaps a charity but the statute requires that an
19 authorized committee contain the name of the person
20 running for office. It is essentially -- I think
21 what we are getting at is there is sort of a merger
22 between the candidate's committee and the candidate

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1 him or herself. There is really no distinction
2 between those two entities. Certainly the candidate
3 has a separate ongoing life but for the duration of
4 that campaign, the committee can't take separate
5 actions. The treasurer can file reports and sign
6 things but it is not as if anyone believes that if
7 the treasurer tried to do something the candidate
8 completing disagreed with or insubordination of what
9 the candidate desired, that the treasurer wouldn't be
10 replaced by someone who did follow the candidate's
11 wishes, so I think I am back at that first step of
12 how this asset is anything other than sort of the
13 merger between the candidate and the candidate's
14 committee and the use of the name is, number one,
15 required by the statute, so how can it be any -- it
16 is not the same type of asset with respect to lending
17 it to some separate entity?

18 MS. ABEGG: I guess because I am coming at
19 it -- I am viewing it more -- the name, from an
20 intellectual property standpoint, that it is an asset
21 and it is an asset that can lose value through
22 repeated use, and then at the end of the campaign it

1 may not have much value then.

2 COMMISSIONER BAUERLY: But that is the
3 condition of running for office. The statute
4 requires -- when you use choose to run for office, it
5 requires the use of your name. And so while it may
6 be an asset, and I can certainly appreciate the
7 intellectual property analogy, it is not a choice to
8 use it in the campaign context, it is a requirement.
9 So it becomes merged with the rest of that effort.

10 MS. ABEGG: But that is not clear. There is
11 no rule in the statute or in the regs that prohibits
12 this. I mean, up to this point --

13 COMMISSIONER BAUERLY: There is a statue
14 that says your authorized committee has to contain
15 your name.

16 MS. ABEGG: I am talking about the personal
17 use. There is no clear rule that this is not
18 permitted.

19 COMMISSIONER WEINTRAUB: Let me try it this
20 way. Let's say it is a really brutal campaign and
21 the candidate's reputation is really trashed during
22 the campaign. You wouldn't take the position that

1 the campaign can compensate the candidate at the end
2 of the campaign for the lost value of his reputation,
3 would you?

4 MS. ABEGG: No, but I would argue that the
5 candidate, if they were famous, is going to have
6 trouble going out and using their name to sell a book
7 or maybe people might want to read about that, but
8 the --

9 COMMISSIONER WEINTRAUB: The candidate has a
10 choice. What he wants to do with his life story is
11 up to him. He may choose it to run for office. He
12 may use it to write a book. It is up to him, his
13 call.

14 MS. ABEGG: But if that name is a valuable
15 asset in these other contexts, why is it not also a
16 valuable asset -- I mean I understand that the
17 campaign has to be able to use that asset, but why
18 can they not provide consideration in return for use
19 of that?

20 COMMISSIONER WEINTRAUB: Because it is an
21 implicit condition of running for office, that the
22 campaign is going to use your name. There is just no

1 other way for anybody to run for office unless their
2 campaign uses their name.

3 MS. ABEGG: Right, but there is also nothing
4 in the statute, the regs, that states you may not
5 receive anything in return for the use of that name.

6 COMMISSIONER WEINTRAUB: There is certainly
7 a statute that says you are not allowed to personally
8 benefit from your campaign. That is in the statute.

9 MS. ABEGG: Right. That is --

10 CHAIRMAN MCGAHN: You can't use campaign
11 assets. You can personally benefit from running for
12 office. That is not prohibited. People do that all
13 the time. Alan Keys is still selling books from his
14 presidential run, for example.

15 COMMISSIONER WEINTRAUB: Fair point.

16 CHAIRMAN MCGAHN: But it is personal use of
17 campaign assets so maybe there is distinction there,
18 maybe there isn't.

19 Mr. Vice Chair has been waiting?

20 VICE CHAIRMAN WALTHER: I have a question,
21 just to run through the thought process. If one were
22 to contribute a Ford to the campaign and a lot of

1 money was raised in the campaign and they ultimately
2 bought a Cadillac and the campaign is over, and the
3 candidate ends up with the Cadillac. How would you
4 view that one?

5 MS. ABEGG: I would view that differently
6 because the car is separate from the candidate. The
7 name remains with the candidate. The candidate can
8 give the car to the campaign.

9 VICE CHAIRMAN WALTHER: If the candidate
10 gives a thousand names and then the candidate's
11 campaign generates contributions, and that money is
12 used to buy a list of people who know nothing about
13 the candidate, just cold hard names and numbers, and
14 has nothing to do with -- these people have no
15 idea -- they are on a list, that list is to me just
16 an asset that has nothing to do with the candidate's
17 sweat equity, it has to do simply with using campaign
18 money to buy a list of names, and then when the
19 campaign is over, and in this case, even before the
20 campaign was over, the candidate benefits from that
21 list, all of the money spent for that cold hard
22 anonymous number of names, what would be the

1 difference there? Because the candidate in this
2 particular case, \$200,000 was spent to generate a
3 huge list of people who may not even know who the
4 candidate was, by renting it or buying those lists
5 from groups, that type of thing. So where is the
6 distinction?

7 MS. ABEGG: I guess I wouldn't look at what
8 was spent, I would look at the fair market value of
9 the list. The resulting list, is that the same --

10 VICE CHAIRMAN WALTHER: That is pretty much
11 the value of the Cadillac.

12 MS. ABEGG: Your example, the candidate was
13 providing a list which was then enhanced through the
14 campaign's efforts.

15 VICE CHAIRMAN WALTHER: Those thousand names
16 are still there, maybe they are not, but you are
17 telling me that because there was one or two strands
18 of names that came from family, that all the campaign
19 money that is being used, \$200,000 to buy lists of
20 names of people who know nothing about the candidate,
21 all of a sudden can be used by the candidate, being
22 enriched by that?

1 MS. ABEGG: Not necessarily. I assume there
2 is no agreement in your hypothetical.

3 CHAIRMAN MCGAHN: That is different than
4 what we have here, right? I think that is the point.
5 Right, it is not a situation where the campaign can
6 use campaign funds, buy a list, and the candidate
7 actually owns those names.

8 MS. ABEGG: Correct.

9 CHAIRMAN MCGAHN: Under the memo of
10 understanding it is names generated as the result of
11 any direct mail solicitation. So there is some --

12 MS. ABEGG: Right. Mr. Rogers wasn't
13 claiming an interest in just the list that was
14 rented.

15 CHAIRMAN MCGAHN: So to go down the road the
16 road the Vice Chairman was going down, the Cadillac
17 situation, that is personal use, you can't just take
18 the car.

19 MS. ABEGG: Correct.

20 CHAIRMAN MCGAHN: The campaign buys names,
21 the candidate is not going to own those.

22 MS. ABEGG: Correct.

1 CHAIRMAN MCGAHN: Keep going though, what is
2 the distinction between that and the situation that
3 your client is in, maybe I have already answered the
4 question? Because there are names that in a
5 solicitation money was given to his guy's campaign so
6 therefore he has a co-ownership interest in --

7 MS. ABEGG: Right, in response to mailings
8 that were mailed out over his name, the same as the
9 responses you would get if you lent your name to your
10 leadership PAC. The leadership PAC is spending lots
11 of money renting names, yet the candidate still
12 receives those responses.

13 CHAIRMAN MCGAHN: Isn't that because a
14 leadership PAC called, let's say ABC PAC, but that
15 probably hits too close to home because there was an
16 AO about those guys, but XYZ PAC, no one would give
17 to the XYZ PAC but for the fact that Congressman So
18 and So is signing the letter, right? The campaign is
19 not going to be called XYZ PAC, it is going to be
20 called Friends of Dave Rogers.

21 MS. ABEGG: Correct. They are giving
22 because of Dave Rogers, because they like him, they

1 like his positions.

2 CHAIRMAN MCGAHN: What would keep a
3 candidate -- and may be the answer is, it is none of
4 our business, and if we think it is our business, we
5 should pass a rule, but what would keep a candidate
6 from running for office, raising money, putting names
7 into a list, and then deciding to prospect out the
8 wazoo. Every campaign dollar that comes in they put
9 right back into developing a list and none of the
10 money that really is raised ever really goes into
11 voter contact or anything that normal campaigns do.
12 It becomes a churn and burn prospecting and this
13 Commission has taken issue with some so-called break
14 even deals over the years, but let's assume it is a
15 legitimate break even deal, you hire some firm, all
16 they churn and burn, use your name, and buildup a
17 mega-list using essentially nothing but campaign
18 funds and the candidate's name. The candidate has an
19 agreement that says he co-owns that name, so he can
20 take that list and go out and sell it, even though
21 the campaign essentially -- the campaign funds were
22 used intentionally to build the list.

1 That is my concern, on the other extreme, if
2 we go -- if we say, it is okay for a candidate to
3 have some kind of deal with the campaign for
4 co-ownership of the list, isn't there a problem with
5 that going too far, where somebody essentially just
6 uses campaign funds to build a list and then put the
7 money in their pocket?

8 MS. ABEGG: I don't know that lists are that
9 valuable that someone would go through all the work
10 of being a candidate just to get a list. That just
11 seems --

12 CHAIRMAN MCGAHN: That is a hypothetical
13 that is too hypothetical?

14 MS. ABEGG: I think so. I can't imagine
15 someone would want to run for office just to get a
16 list. And not put any money into trying to
17 getting elected.

18 CHAIRMAN MCGAHN: Let's flip it around. I
19 could see certain mail consultants and list people
20 encouraging people to run, hey, you are big on guns,
21 this is an NRA district, you can build a great list
22 just on the gun issue. You sign this and then you

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1 can end up owning the list. Let's say it is
2 consultant driven. And that is what we have seen, in
3 the one MUR on the break even agreement, was much
4 more consultant driven and these are these mail
5 consultants out there that wheel and deal in the list
6 world, and that is a concern of mine, you use the
7 candidate's name and it ends up the candidate doesn't
8 really make money but the list guy makes money.

9 Are there concerns here that are unfounded?

10 MS. ABEGG: I guess it would be too early to
11 tell. The only time I think that would be possible
12 would be in the primary context because it is not
13 going to happen in the general election. You have
14 the political parties --

15 CHAIRMAN MCGAHN: Actually these primary
16 candidates who get shellacked by these mail
17 consultants and they tell them they are going to make
18 money and they don't, and all that. Lists are
19 different, and they are different than Cadillacs, but
20 that is really the question for me, how different is
21 this from a leadership PAC or a party, and I am still
22 having trouble seeing the extra -- I agree that the

1 candidate's name has value and I agrees that the life
2 story has value, but that is the case in every
3 campaign and then if we just side-step the exchange,
4 the idea that we need some sort of exchange, that
5 makes it easy, but I am not so sure that is the way
6 to go either. That is where I am struggling.
7 Anything else you can add on that point might help
8 me.

9 MS. ABEGG: I think it is a determination
10 the Commission shouldn't get involved in. It is
11 going to get harder, especially these days as more
12 and more famous people are running for office and we
13 have less of your average Joe that would want to
14 undertake this. So how do you value sport celebrity
15 A over actor B? Those valuations are too hard to
16 make.

17 CHAIRMAN MCGAHN: Certainly an emerging area
18 of law. One athlete's silhouette on sneakers is
19 suddenly worth a lot because it is just a silhouette,
20 it is not even him.

21 MS. ABEGG: Right and that is why I think
22 there should be rulemaking, and not do this through

1 MURs, if the Commission decides this is not the way
2 to go.

3 COMMISSIONER WEINTRAUB: One other point,
4 and you may not be able to answer this because this
5 is actually more of a factual question. In the
6 course of this enforcement action, the committee was
7 asked for its solicitation letters that were used to
8 help generate these lists and I think there was a
9 flood or something and the solicitation letters were
10 not able to be produced. Is that right?

11 THE WITNESS: That is my belief. There was
12 a flood in Mr. Rogers' home and everything in the
13 basement was lost.

14 COMMISSIONER WEINTRAUB: But presumably
15 there was something else, and you may or may not know
16 this, in the solicitation letters besides Dave
17 Rogers' life story. I am guessing there was
18 something about what a bad guy Patrick Kennedy is or
19 something about tax and spend liberals in Congress or
20 something like that, there must have been some other
21 pitch in these letters besides send money because
22 Dave Rogers is uniquely fit to serve in Congress

1 because of his life story, right?

2 MS. ABEGG: I don't know.

3 COMMISSIONER WEINTRAUB: It seems to me
4 there is a problem with the biography angle. If the
5 value of the list is all tied up with his personal
6 biography, it is not going to be worth too much to
7 other people, maybe to John McCain who has a similar
8 former armed services person or Chuck Hagel or Bob
9 Kerry or John Kerry, but it seems to me the value of
10 the list is actually more as a list of people who
11 respond to appeals to fight liberals in Congress or
12 stand for gun rights or something like that and the
13 more it is a generic list to people -- the more
14 valuable it is because it is a generic list, the less
15 value he has contributed because of his personal life
16 story.

17 You can respond to that if you want. That
18 is sort of a statement and sort of a question.

19 CHAIRMAN MCGAHN: I am not sure I understand
20 the question. I was with you to the end.

21 COMMISSIONER WEINTRAUB: It is an
22 opportunity to respond to this belief on my part that

1 the list is not worth much if all it is is people who
2 respond to Dave Rogers personally. It is only worth
3 something if other people besides Dave Rogers can get
4 money out of it, and to the extent that it is
5 valuable to people other than Dave Rogers, then the
6 value of his biography in generating that list is not
7 as great as you are suggesting.

8 MS. ABEGG: I guess another example, suppose
9 Arnold Schwarzenegger ran for federal office. That
10 list that he generated, people could be interested in
11 him for his political views, because he is an actor,
12 all sorts of things.

13 COMMISSIONER WEINTRAUB: Not everybody who
14 wants to give to Arnold Schwarzenegger is going to
15 want to give to Joe Schmo who buys the list from him
16 because he is not Arnold Schwarzenegger.

17 MS. ABEGG: Not necessarily. He doesn't
18 have to rent the list to another organization raising
19 money. He could rent the list to a book publisher
20 who wants to mail to people to try to get them to buy
21 Arnold's book or --

22 CHAIRMAN MCGAHN: This is where it gets

1 touch about books because there is so much real and
2 pseudo science about why lists works and my guess is
3 you are going to say that is not something the FEC
4 needs to figure out in detail. Hypothetically, let's
5 say Charlton Heston ran for Congress. If you were
6 the NRA, you may want to rent that list, because that
7 would go beyond the cult of personality -- once you
8 get rid of the person, does the list have any value?
9 Some case it certainly could.

10 The question is two-fold, one, does it
11 matter in this case, and two, does this list have any
12 value beyond Rogers signing it because he is prior
13 military, he is Seal, maybe there is some donor group
14 in this list will respond because it is a
15 pro-military group, or who knows. But it seems like
16 there is because somebody paid him money for it.

17 MS. ABEGG: Correct, and the market will
18 bear that out. If the list owner does a couple of
19 mailings and it is not successful --

20 CHAIRMAN MCGAHN: The concern I had, though,
21 it may not be relevant in this case, but my further
22 concern is you could have a list broker who ramps up

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1 a candidate to go down this road and then basically
2 buys the list at the tail end knowing they can make
3 more money on the list because every list is worth
4 something, if there is any sort of contribution
5 history, there is always value to those names. That
6 is how lists work. But in those instances simply
7 because somebody bought the names doesn't necessarily
8 make it worth what they paid. This is second
9 guessing what would appear to be a private
10 transaction. This is why the whole list area is just
11 its whole own world.

12 MS. ABEGG: Going back to your hypothetical,
13 maybe you could get at it, if you have a list broker
14 in collusion with someone to try to get them to run
15 for office, maybe get at it from that angle rather
16 than just prohibiting it outright.

17 CHAIRMAN MCGAHN: This is so far afield. I
18 am getting at break even deals and all that because
19 that is something, consultants sell this bill of
20 goods to candidates and unfortunately more often than
21 that, and say, hey, you don't have to spend any
22 money, we will front the money, and there was a time

1 that was common, but then you realize it is basically
2 a massive corporate in-kind, that calmed it down
3 some, but it still goes on and it is a concern in the
4 list work that I have that people get themselves into
5 a situation where the only way out is to sell the
6 list because conveniently now they have a
7 co-ownership thing. Probably doesn't have anything
8 to do with this case, but if there is anything that
9 you can grab a hold on to what is really the issue, I
10 would appreciate it:

11 Any other questions from the Commissioners?

12 Under our policy statement, counsel gets to
13 ask some questions. I am not entirely sure if they
14 have any.

15 MS. DUNCAN: Thank you, Mr. Chairman. I
16 think the Commission has really explored to a great
17 extent the area we found most problematic in the case
18 and we have expressed that in the briefs which is
19 that the candidate is receiving this valuable
20 consideration in exchange for his authorized
21 committee using his name and his life story which we
22 contend I think, and as some of the questions have

1 indicated, the authorized committee already has and
2 should have the ability to use just in connection
3 with actually running for office.

4 So I won't ask any questions about that, but
5 let me ask a couple of questions about the other
6 aspect of what you are contending was valuable. In
7 terms of what the candidate actually provided, I
8 think you said the name, the life story, and then
9 also the initial list which I think we have indicated
10 or has been indicated in deposition testimony
11 consisted of about 500 or so names.

12 Do you have a position as to the value of
13 that initial list that the candidate provided to the
14 committee?

15 MS. ABEGG: I don't at this time.

16 MS. DUNCAN: Would you acknowledge though
17 that there was certainly a distinction between
18 whatever it may have been valued at and what the
19 ultimate global list that resulted was valued at at
20 least by BMW when it bought it?

21 MS. ABEGG: Yes.

22 MS. DUNCAN: We don't have any further

1 questions.

2 CHAIRMAN MCGAHN: Actually I have one -- I
3 hope it is a final question. If we agree with
4 counsel and found probable cause and essentially
5 decide the case, because in FEC-speak that is a
6 pretty significant decision, does that change the law
7 in this area, and if so, how? How does it affect
8 these other MURs? If you are coming in and saying
9 the rule is this, is this a change in that, and if
10 so, does that matter, and thinking forward, what does
11 this mean for the Commission?

12 MS. ABEGG: I think it would also depend on
13 what the findings said, the explanation. I think it
14 would give some --

15 CHAIRMAN MCGAHN: Let me ask it directly.
16 Let's say we find probable cause that Rogers
17 converted campaign assets to personal use.
18 Understand that is basically the gist -- that is the
19 legal theory. The Commission does that, what does
20 that mean for the other MURs and other people, and is
21 this a change, and if it is a change, how does that
22 affect what is going on?

1 MS. ABEGG: I think it would definitely give
2 candidates pause.

3 CHAIRMAN MCGAHN: That is obvious.

4 MS. ABEGG: Right, but I think it would make
5 those in the regulated community, organizations, PACs
6 and parties, it would give definitely give them pause
7 as to -- obviously the personal use is not going to
8 be applied but does that call into question their
9 arrangements then because along with the personal use
10 finding, you know, if there is a finding regarding
11 that there was not fair market value or arm's length
12 or usual and normal charge, then where does it leave
13 these other candidates and organizations, does that
14 call into question their transactions.

15 CHAIRMAN MCGAHN: PACs and party committees
16 don't have a personal use prohibition, right?

17 MS. ABEGG: Correct, but if part of the
18 finding is personal use because there was not fair
19 market value, then these other candidates dealing
20 with parties and PACs are going to wonder what is
21 fair market value, is what I am doing fair market
22 value. So I think it does have potential effect

1 outside of just personal use.

2 CHAIRMAN MCGAHN: Anything else?

3 I don't recall if you split up your time in
4 the beginning between an opening and closing, because
5 I don't remember, I assume you did, and if you want
6 to make just a short recap before we adjourn.

7 MS. ABEGG: Sure. I think I have said
8 everything I wanted to say, but I think this exchange
9 has been good and I just wish it would -- could occur
10 in the context of a rulemaking, whether there be a
11 lot other participants other than myself who could
12 shed more light on the issue and help you with your
13 deliberations in this area. I think there is
14 guidance needed because I think it is different than
15 providing other types of assets to the campaign and
16 it has application to other areas and I think we are
17 going to see more and more of this, especially as
18 more famous people run for office and want to get
19 names in return.

20 So I would urge the Commission to institute
21 rulemaking in addition to whatever they decide in
22 this MUR.

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CHAIRMAN MCGAHN: Thank you.

Unless there is anything else, I would like
to adjourn.

Hearing none, we are adjourned. Thank you.

(Whereupon, at 11:17 a.m., the hearing was
adjourned.)

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